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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
BOULEVARD EXCAVATING, INC., )  
 )  
Appellant, )  
 )  
v. )  
 )  
PUGET SOUND AIR POLLUTION )  
CONTROL AGENCY, )  
 )  
Respondent. )

PCHB No. 78-72

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of three \$250 civil penalties, arises from the alleged violation (asbestos) of Sections 9.11(a) and 9.15(a) of respondent's Regulation I and WAC 173-400-075, a regulation of the State Department of Ecology. The hearing was held before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened at Tacoma, Washington on June 7, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant, Boulevard Excavating, Inc., appeared by and through

1 its attorney, Thomas R. Dreiling. Respondent appeared by and through  
2 its attorney, Keith D. McGoffin. Reporter Kim Otis Rommel of Federal  
3 Way recorded the proceedings.

4 Witnesses were sworn and testified. Exhibits were examined. From  
5 testimony heard and exhibits examined, the Pollution Control Hearings  
6 Board makes these

#### 7 FINDINGS OF FACT

##### 8 I

9 Respondent, pursuant to RCW 43.21B.260, has filed with this Hearings  
10 Board a certified copy of its Regulation I containing respondent's  
11 regulations and amendments thereto, of which official notice is taken.

##### 12 II

13 The appellant, Boulevard Excavating, Inc., is a professional demo-  
14 lition contractor. Appellant's general foreman has attended at least one  
15 national convention which focused on the proper procedure for demolishing  
16 buildings which contain asbestos. Nine months prior to the events of  
17 this appeal, which involves asbestos, the respondent served appellant's  
18 general foreman with a verbatim copy of the federal regulations governing  
19 demolition of buildings containing asbestos (Exhibit R-2).

20 On February 6, 1978, appellant notified respondent of its intent to  
21 demolish a building containing asbestos (Exhibit R-3). That building,  
22 a six-story concrete dormitory, is located near the Swedish Hospital  
23 Medical Center which owns the dormitory. In the vicinity are several  
24 other of Seattle's major hospitals together with a number of apartment  
25 buildings.

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On February 27, 1978, respondent's air pollution inspector visited the dormitory site where appellant had begun demolition several days previously. Respondent's inspector arrived at 11:04 a.m. and observed that windows and doors had been removed and that demolition had taken place in the basement. He saw chunks of dry, white material lying on the basement floor and the same material on the dormitory's boiler pipes. Since no workmen were present, he left and returned at 3:10 p.m. the same day. Asking and obtaining the workmen's permission, he went into the dormitory's boiler room where he observed the workmen, appellant's employees, stripping the white material from boiler pipes, a boiler and a hot water tank. Pieces of the material were being broken off with knives. Men working on pipes 20-30 feet above the floor dropped the white material which fell, broke on impact, and powdered into dust which became airborne. The white airborne dust filled the boiler room and escaped through the door opening where it rose high up into the outside air. Although a water hose was present on the site it was not in use at the time the inspector made the observations. Rather, the appellant had only used the water hose to wet the white material covering the pipes between 7:00 and 8:30 a.m. that morning. In accordance with appellant's policy, no material was stripped during this wetting period. Stripping of the pipes therefore commenced when the wetting ended around 8:30 a.m. and was still in progress, without further wetting, when the inspector arrived at 3:10 p.m. Appellant contends that wetting the pipes while stripping them would cause dangerous footing conditions for the workmen who are working on the pipes, high

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1 above the ground. Appellant further contends that wetting the stripped  
2 white material on the floor would create a dangerous slippery condition.  
3 The inspector collected a sample of the white material which was being  
4 stripped from the pipes and which became airborne as dust. At the  
5 inspector's request, the workmen then wetted down the white material  
6 using the water hose.

7 Subsequent laboratory testing by respondent revealed that the  
8 white material was, by weight, 12-1/2 percent asbestos, 1.9 percent  
9 water (moisture) and that the balance consisted of limestone. These  
10 components were bonded together so that when reduced to dust the  
11 composition of the dust would be the same. The material could be reduced  
12 to dust by hand pressure. Such dust particles, containing asbestos, are  
13 easily inhaled and can cause severe damage to lungs including scarring  
14 and shrinkage. Once such asbestos-containing particles are disbursed  
15 into the air, one who inhales the particles would not be aware of it.

16 The appellant received, by mail, three Notices and Orders of  
17 Civil Penalty: No. 3729 citing violation of respondent's Section 9.15(a)  
18 of Regulation I; No. 3730 citing violation of respondent's Section 9.11(a)  
19 of Regulation I; and No. 3746 citing violation of WAC 173-400-075, a  
20 regulation of the State Department of Ecology. Each of these Notices  
21 assessed a civil penalty in the amount of \$250 (total \$750). From  
22 these penalties, appellant appeals.

#### 23 IV

24 Any Conclusion of Law which should be deemed a Finding of Fact  
25 is hereby adopted as such.

26 From these Findings, the Pollution Control Hearings Board

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comes to these

## CONCLUSIONS OF LAW

### I

WAC 173-400-075. Congress has enacted a special program for control of "Hazardous Air Pollutants" which are defined as:

. . . an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator [of the Environmental Protection Agency] causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness. [Wording in brackets added.]

Section 112(a)(1), Clean Air Act of 1970, BNA Environmental Reporter, Federal Laws, 71:1117-8. Pursuant to the same statutory section, the Administrator has identified, by regulation, the pollutants severe enough in their environmental effect to warrant inclusion under the above definition. Thus far, there are only four: (1) asbestos; (2) beryllium; (3) beryllium rocket motor firing, and (4) mercury. 40 CFR 61.

The regulation cited against appellant, WAC 173-400-075, was adopted by the State Department of Ecology and states, in pertinent part:

(1) The emission standards for asbestos, beryllium, beryllium rocket motor firing, and mercury promulgated by the United States environmental protection agency prior to November 1, 1976, as contained in title 40, code of federal regulations, part 61, are by this reference adopted and incorporated herein.

. . . .

Respondent specifically cited 40 CFR 61.22(d)(4)(ii) of the incorporated federal asbestos rules. (See Exhibits R-8 and R-11). This states:

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(4) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:

(ii) Friable asbestos materials used to insulate or fireproof pipes, ducts, boilers, tanks, reactors, turbines, furnaces, or structural members shall be adequately wetted during stripping, except as provided in [provisions not pertinent here].  
[Wording in brackets added.]

"Friable asbestos material" means any material that contains more than one percent asbestos by weight and that can be crumbled, pulverized or reduced to powder, when dry, by hand pressure. 40 CFR 61.21(K).

Though not specifically cited by respondent, the respondent's evidence<sup>1</sup> also invokes 40 CFR 61.22(d)(4)(v) which states in pertinent part:

All friable asbestos materials that have been removed or stripped shall be adequately wetted to ensure that such materials remain wet during all remaining stages of demolition or renovation and related handling operations. Such materials shall not be dropped or thrown to the ground . . . .

By wetting down only between the hours of 7:00 a.m. and 8:30 a.m. but stripping as long afterward as 3:10 p.m., appellant violated WAC 173-400-075 by failing to adequately wet friable asbestos materials, during stripping, which resulted in emissions of particulate asbestos material to the outside air. (40 CFR 61.22(d)(4)(ii).) Appellant

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1. When appealed to this Hearings Board, a Notice and Order of Civil Penalty has the effect of a civil complaint. International Paper Company v. Southwest Air Pollution Control Authority, PCHB Nos. 77-55, 77-84 and 77-94 (1977). We therefore look to the civil rules for superior court and specifically CR 15(b) which provides for the amendment of a pleading to conform to the evidence. The above rule, 40 CFR 61.22(d)(4)(v) incorporated in WAC 173-400-075 will therefore be treated as if raised in the Notice and Order of Civil Penalty.

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violated WAC 173-400-075 by dropping friable asbestos material and failing  
to ensure that such material, once removed, remained wet during all  
remaining stages of demolition which conduct resulted in emissions of  
particulate asbestos material to the outside air. (40 CFR 61.22(d)(4)(v).)

The appellant, who is justly concerned for its workers' safety,  
must draw upon its experience as a demolition contractor to achieve  
adequate wetting and careful handling of friable asbestos in a way  
that is consistent with worker safety.

## II

Section 9.15(a). Respondent's Section 9.15(a) of Regulation I  
states:

It shall be unlawful for any person to cause or permit  
particulate matter to be handled, transported or stored  
without taking reasonable precautions to prevent the  
particulate matter from becoming airborne.

"Particulate matter" is "any material . . . that is or has been  
airborne and exists as a liquid or a solid at standard conditions."  
Section 1.07(w) of Regulation I. This definition therefore includes  
the white dust containing asbestos which became airborne in this case.  
By wetting down only between the hours of 7:00 a.m. and 8:30 a.m. but  
stripping as long afterward at 3:10 p.m., appellant caused particulate  
matter to be handled without taking reasonable precautions to prevent  
it from becoming airborne. Such reasonable precautions would include,  
at a minimum, frequent watering and careful handling. Appellant  
therefore violated Section 9.15(a).

## III

Section 9.11(a). Respondent's Section 9.11(a) of Regulation I

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1 states:

2 It shall be unlawful for any person to cause or permit  
3 the emission of an air contaminant or water vapor, including  
4 an air contaminant whose emission is not otherwise  
5 prohibited by this Regulation, if the air contaminant or  
6 water vapor causes detriment to the health, safety or  
7 welfare of any person, or causes damage to property or  
8 business.

9 "Air contaminant" is "dust, fumes, mist, smoke, other particulate  
10 matter . . .". Section 1.07(b); RCW 70.94.030(1). "Emission" is "a  
11 release into the outdoor atmosphere of air contaminants." Section  
12 1.07(j); RCW 70.94.030(8). In construing the meaning of "causes detriment  
13 to the health . . . of any person", a phrase not defined elsewhere in  
14 Regulation I, we look to the public policy contained in the Clean Air  
15 Act, chapter 70.94 RCW, which respondent's Regulation I implements.  
16 By RCW 70.94.011 "It is declared to be the public policy of the state  
17 to secure and maintain such levels of air quality as will protect  
18 human health . . . ". We have previously held that the antithesis of  
19 this policy, and the evil to be prohibited, is "air pollution".  
20 Justus Shake Co. v. Olympic Air Pollution Control Authority, PCHB  
21 No. 77-95 (1978). "Air Pollution" is defined as:

22 . . . presence in the outdoor atmosphere of one or more air  
23 contaminants in sufficient quantities and of such  
24 characteristics and duration as is, or is likely to be  
25 injurious to human health, plant or animal life, or  
26 property, or which unreasonably interfere with enjoyment  
27 of life and property. Section 1.07(c) of Regulation I.  
RCW 70.94.030(2). [Emphasis added]

28 We have previously construed respondent's Section 9.11(a) by reference  
29 to this definition of "air pollution". Crow Roofing and Sheet Metal,  
30 Inc. v. Puget Sound Air Pollution Control Agency, PCHB No. 1098  
31 (1977); Boulevard Excavating, Inc. v. Puget Sound Air Pollution Control

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Agency, PCHB No. 77-69 (1977); Cudahy Company v. Puget Sound Air

Pollution Control Agency, PCHB No. 77-98, et seq (1977). We now hold that an air contaminant emission "causes detriment to the health of any person" (Section 9.11(a)) whenever it "is, or is likely to be, injurious to human health." (RCW 70.94.030(2).)

Respondent has proven that appellant released asbestos dust into the outdoor atmosphere in sufficient quantities as is, or is likely to be, injurious to human health. We therefore conclude that appellant has violated respondent's Section 9.11(a).<sup>2</sup>

#### IV

Appellant contends that Sections 9.11 and 9.15 of Regulation I and WAC 173-400-075, each cited in this matter, are void for vagueness. In the absence of any indication to the contrary, we construe this to be a constitutional issue arising out of the guarantee of due process of law. This Hearings Board declines to rule upon a constitutional issue because "An administrative tribunal is without authority to determine the constitutionality of a statute. . .". Yakima Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255, 257, 534 P.2d 33, 34 (1975). The Pollution Control Hearings Board is such an administrative tribunal. Id. at 264. RCW 43.21B.010, 43.21B.020. If we were to rule, however, we would reject this contention. A regulation is void for vagueness only if

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2. Where, as here, an air contaminant is shown as injurious, or likely to be injurious, to human health although one breathing the contaminant would not be aware of it, evidence of harm to a specific person is not required to prove a violation of Section 9.11(a). We reserve for future cases the question of whether harm to a specific person must be shown to prove violation of Section 9.11(a) in other factual situations.

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1 men of common intelligence must guess at its meaning and differ as to  
2 its application. State v. Malone, 9 Wash. App. 122, 511 P.2d 671 (1973).  
3 We conclude that the language of Sections 9.11 and 9.15 and  
4 WAC 173-400-075, as applied to this matter, informs a person of ordinary  
5 understanding of what is proscribed. Regarding Section 9.11, see  
6 Cudahy Company v. Puget Sound Air Pollution Control Agency, PCHB  
7 No. 77-98, et seq (1977) in which we discussed this issue at length.  
8 Regarding Section 9.15(a), we note that the operative phrase "reasonable  
9 precautions" imposes a standard of conduct hardly distinguishable from  
10 the long upheld duty of "reasonable care" established in the common  
11 law, regarding WAC 173-400-075, see U. S. v. Big Chief, 7 ERC 1840,  
12 1843 (U.S. D.C., E.D. La., 1975) upholding 40 CFR 61.22(d) against a  
13 challenge of vagueness.

14 V

15 The appellant's contention that these civil penalties are void  
16 because imposed without adequate guidelines, as to the amount of penalty,  
17 is without merit. This argument was rejected in Yakima Clean Air  
18 Authority v. Glascam Builders, Inc., 85 Wn.2d 255, 534 P.2d 33, 37 (1975).  
19 We have examined the remaining contentions of appellant and find them  
20 to be without merit.

21 VI

22 Appellant has caused substantial and unnecessary emissions of  
23 asbestos, a substance so harmful in its effect upon human health that  
24 it is one of only four air pollutants especially denominated as hazardous  
25 by the federal government. This it did in the midst of an urban hospital  
26 and apartment district, although appellant is an experienced demolition

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contractor and had been previously served with rules governing the demolition of buildings containing asbestos. Under these circumstances, imposition of the maximum civil penalty is fully justified.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

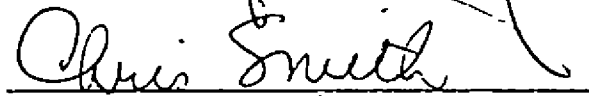
ORDER

The three violations and three \$250 civil penalties (total \$750) are each affirmed.

DONE at Lacey, Washington, this 3d day of July, 1978.

POLLUTION CONTROL HEARINGS BOARD

  
DAVE J. MOONEY, Chairman

  
CHRIS SMITH, Member